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No. 93-99

In The

Supreme Court of the United States

October Term, 1993

U.S. METROLINE SERVICES, INC.,

Petitioner,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONSE TO QUESTIONS PRESENTED

1. The Fifth Circuit did not err in applying the law of the case doctrine in concluding the first prong of the *Midcal* test had been met.

2. The Fifth Circuit correctly relied on clear Texas law in finding that the *Midcal* first-prong ("clear articulation") test of state action immunity had been met.

3. Whether viewed as affirming a dismissal under Fed. R. Civ. P. Rule 12 (b) (6) or a summary judgment under Rule 56, the Fifth Circuit's handling of the appeal on remand was consistent with decisions of the other federal circuits and did not prejudice Petitioner USM.

4. The Fifth Circuit correctly concluded that the specific conduct complained of by Petitioner is being actively regulated by the Texas PUC.

5. Certiorari is not appropriate to review inferior courts' analysis of the facts.

6. The affidavits submitted by USM's counsel, while irrelevant, are not appropriately considered by this Court because they were not part of the record below.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Southwestern Bell Telephone Company ("SWBT")[1] provides

1. Per Supreme Court Rule 29.1, Respondent Southwestern Bell Telephone Company states that it is a wholly-owned subsidiary of its parent, Southwestern Bell Corporation. Southwestern Bell Corporation is a publicly-

(Cont'd)

telecommunications services in Texas pursuant to a Certificate of Convenience and Necessity issued by the Public Utility Commission of Texas ("Texas PUC"). SWBT's franchised service areas include parts of the Dallas-Ft. Worth "Metroplex." Calls between SWBT's Dallas and Ft. Worth local telephone exchanges are ordinarily toll calls in accordance with SWBT's tariffs filed with and approved by the Texas PUC.

U.S. Metroline Services, Inc. ("USM") (formerly DFW Metroline Services) and SWBT each offer a form of flat-rate calling between the Dallas and Ft. Worth exchanges. SWBT's tariffed service is called "Extended Metropolitan Service" ("EMS"). For an additional monthly charge for the optional EMS service, SWBT customers enjoy an expanded toll-free calling scope of the two exchanges without incurring usage-sensitive long-distance charges. By tariff, the EMS service offered by SWBT for the expanded Dallas-Ft. Worth calling scope is available only to customers located in the areas abutting these two exchanges. Customers who want EMS Service from SWBT but are not located in these discrete areas must, by tariff, pay a mileage fee to connect their premises with the nearest SWBT central office providing EMS service. In addition, such customers must pay the tariffed EMS rate as approved by the Texas PUC.

USM is not regulated by the Texas PUC and offers a flat-rate calling service to residents of the Dallas-Ft. Worth area which USM refers to as "metro service." Metro service enables USM's customers to avoid payment of long-distance and mileage charges for calls between those two cities. In providing its metro service, USM uses certain SWBT tariffed services.

(Cont'd)
traded corporation listed on the NYSE. Bell Communications Research, Inc. ("Bellcore") is a subsidiary jointly owned by SWBT and the former Bell Operating Companies pursuant to the AT&T Plan of Reorganization in *United States v. Western Electric Co. et al.*

SWBT complained that USM makes improper use of SWBT's tariffed services in order to provide its metro service, in violation of SWBT's Texas PUC-approved tariffs. SWBT conducted a routine audit of USM in late 1988-1989. Such audits are conducted in order to ensure SWBT's tariffed services are being used in conformance with its approved tariffs, because SWBT may not discriminate among its customers in the provision of tariffed services, per Section 45 of the Texas Public Utility Regulatory Act ("PURA"), Tex. Rev. Civ. Stat. Ann. Art. 1446c, § 1, *et seq.* (Vernon Supp. 1992). Permitting USM to pay less than the applicable tariffed rate paid by other customers would constitute impermissible discrimination by SWBT.

This audit established USM was "reselling" local exchange services obtained from SWBT, in order to provide USM's outbound interexchange service, thereby violating the resale prohibition contained in SWBT's General Exchange Tariff.[2] The audit further established that USM was providing interexchange (*i.e.*, long distance) service without paying the access charges applicable to interexchange carriers under SWBT's Texas PUC-approved Access Service Tariff, which contains no resale prohibition. In setting rates, the Texas PUC, as a matter of public policy, has directed that tariffed access service rates shall be higher than tariffed local exchange service rates.

On March 9, 1989, SWBT wrote informing USM of its misuse of SWBT's services. After discussions with USM, SWBT ultimately sent USM a termination notice scheduled to be effective July 11, 1989. On July 6, 1989, USM filed suit in the United States District Court for the Northern District of Texas, in Dallas, alleging the threatened termination of SWBT services

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2. SWBT's General Exchange Tariff contains a resale prohibition applying to all local exchange customers. There is no "resale prohibition tariff" as stated at page 3 of the Petition.

violated the federal antitrust laws, 15 U.S.C. § 1, *et seq.* On August 30, 1989 the district court denied USM's motion for a preliminary injunction (Appendix H, USM's Brief), and the denial was affirmed by the Fifth Circuit on May 29, 1990. *DFW Metro Line Serv. v. S.W. Bell Telephone Co.*, 901 F.2d 1267 (5th Cir. 1990) (*"Metro I"*), *rehearing denied*, 908 F.2d 971, *cert. denied*, 498 U.S. 985 (1990). (Appendix G to USM's Brief.)

On February 27, 1991, the district court granted SWBT's Motion to Dismiss for Failure to State a Claim, on state-action immunity grounds (Appendix E to USM's Brief.) On appeal, this order was also affirmed by the Fifth Circuit on October 23, 1991. *D.F.W. Metro Line v. S.W. Bell Telephone*, 947 F.2d 1486 (5th Cir. 1991) (unpublished *per curiam* opinion) (*"Metro II"*). (Appendix D to USM's Brief.) USM petitioned this Court for writ of certiorari.

On June 12, 1992, this Court decided *Federal Trade Commission v. Ticor Title Insurance*, 504 U.S.___, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992) (*"Ticor"*). (Appendix C to USM's Brief.) Ten days later, this Court granted the writ, vacated *Metro II* and remanded this case to the Fifth Circuit for further consideration in light of *Ticor. Metroline Services, Inc. v. Southwestern Bell Telephone Co.*, __ U.S.___, 112 S. Ct. 2987, 120 L. Ed. 2d 865 (1992). (Appendix B to USM's Brief.)

On remand, the Fifth Circuit again affirmed the dismissal for failure to state a claim, finding both prongs of the *Midcal*[3] state action immunity test were met, as required by *Ticor. DFW Metro Line v. Southwestern Bell*, 988 F.2d 601 (5th Cir. 1993) (*"Metro III"*).

As the Fifth Circuit recognized in *Metro III*, this is not the only

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3. *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (*"Midcal"*).

proceeding in which these parties are litigating this dispute. On October 4, 1989, just over one month after the district court denied its request for injunctive relief, USM filed a General Complaint and Application for Interim Relief with the Texas PUC. In the Texas PUC proceeding (Texas PUC Docket 9090), USM seeks an order from the Texas PUC: (1) preventing SWBT from disconnecting USM's service, and (2) determining that SWBT's threatened conduct constitutes "violations of law." On December 1, 1989, an administrative law judge for the Texas PUC entered Prehearing Order No. 4. (Appendix Q to this Brief). In Order No. 4, the Texas PUC ordered that "While this complaint is pending before the Commission, SWB[T] shall not terminate service to [USM] and shall provide new telephone lines and numbers to [USM] upon request."

Subsequently, in Order No. 8 (Appendix R to this Brief), the Texas PUC administrative law judge determined that the issues in Docket 9090 were:

> 1. Whether U.S. Metroline is in violation of the tariffs under which it is receiving service from SWB;
>
> 2. Whether the relevant provisions of those tariffs are unreasonable or in any way in violation of any provisions of law, within the meaning of PURA, § 42;
>
> 3. If the answers to the first two questions are in SWB's favor, whether SWB should be permitted to terminate U.S. Metroline's existing service under those tariff provisions pursuant to P.U.C. Subst. R., 23.46.

Texas PUC Docket 9090 is still active and pending (*See* Texas

PUC Docket No. 9090, Order No. 36 (June 18, 1993) (Appendix S to this Brief). As of the date of this brief, SWBT has not terminated service to USM, and USM continues to receive service, pursuant to the Texas PUC's order.[4]

SUMMARY OF ARGUMENT

This is an unexceptional case in which the court of appeals applied settled principles of law to clear facts. The case is notable only because the facts below so squarely conform to this Court's two-prong *Midcal* test for state-action immunity as clarified in *Federal Trade Commission v. Ticor Title Insurance Co.*, 504 U.S.___, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992). The Texas regulatory scheme is clearly articulated, and Texas is actively supervising Respondent SWBT's conduct in a pending administrative docket.

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) and *Ticor* provide that state-action immunity under the federal antitrust laws must be supported by: (1) a clearly articulated affirmative state policy to displace competition and allow the conduct challenged as anticompetitive, and (2) active supervision of the conduct undertaken by the private actor.

Both of these elements are, without any question, present here. Texas has enacted PURA, which by its explicit terms has the objective that regulation of public utilities in Texas substitutes for competition. Texas actively and comprehensively regulates public

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4. On June 4, 1993, USM also filed suit in Texas State District Court for Dallas County, alleging, *inter alia*, that SWBT's threatened conduct violates the Texas Free Enterprise & Antitrust Act, Tex. Bus. & Com. Code Ann. § 15.02, *et seq.* (Vernon Supp. 1993). The case is docketed as No. 93-05990-I, 162nd Judicial District Court, Dallas, Texas. (Appendix T to this Brief.)

utilities and the Texas PUC is at this time directly involved in regulating the specific conduct of SWBT which is the subject of this dispute. In fact, the Texas PUC has prohibited SWBT from taking the steps complained of by Petitioner USM pending the PUC's final resolution of PUC Docket 9090.

Texas policy, and the active regulation of SWBT's conduct, are matters of public record and were appropriately noticed by the Fifth Circuit. Both the district court and the Fifth Circuit concluded there is clear state policy, that Texas actively enforces that policy and regulates the specific conduct in question, and that USM had full opportunity to, and did in fact, respond to SWBT's asserted claim of immunity.

This is a case where the Fifth Circuit applied settled law to state action which is a matter of public record. This case involves no unsettled areas of federal law, nor any legitimate dispute as to the facts. There is simply nothing about this case that would warrant granting USM's petition. SWBT respectfully requests that this Court deny the petition.

REASONS FOR DENYING THE WRIT

I.

THE FIFTH CIRCUIT DID NOT ERR IN APPLYING THE LAW OF THE CASE DOCTRINE IN CONCLUDING THE FIRST PRONG OF THE *MIDCAL* TEST HAD BEEN MET.

The law of the case doctrine generally forecloses a court from reconsidering issues that have been "decided explicitly or by necessary implication in [the] previous disposition." *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703, 715 (9th Cir. 1990); *Knotts v. United States*, 893 F.2d 758 (5th Cir. 1990).

This rule "promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.' " *Christianson v. Colt Industries,* 486 U.S. 800, 816 (1988). While the doctrine is not a limit on a court's authority:

> It is, however, a rule of practice that has been more or less strictly followed. Generally when a litigant has presented an issue on the first appeal, and it has been fully briefed and squarely decided . . . it would not serve a useful purpose to permit the party to present the same issue again simply because to determine other matters the case must return to the Court of Appeals.

1B *Moore's Federal Practice* ¶ 0.404 [1] at II-4 (1993).

Although the Fifth Circuit had the power to revisit its prior decision in this case, "prior decision of legal issues should be followed unless there is substantially different evidence at a subsequent trial, new controlling authority, or the prior decision was clearly erroneous and would result in injustice." *Beneficial Life Ins. Co. v. Knobelauch,* 653 F.2d 393 (9th Cir. 1981); *see also, Wyoming v. Oklahoma,* 502 U.S.___, 112 S. Ct. 789, 117 L. Ed. 2d 1, 17 (1992) (citing *Arizona v. California,* 460 U.S. 605 (1983) (prior rulings, even in original jurisdiction cases, "should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated.")

In its decision in *Metro I,* the Fifth Circuit specifically held:

> As an additional basis for our holding, we find that Southwestern Bell is immune from the antitrust liability alleged in DFW's Complaint

> under the "state action" doctrine enunciated in *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943), as applied to private State-regulated rate making by *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985). Southwestern Bell clearly meets the two-prong test set out in *California Retail Dealer's Assn. v. Midcal Aluminum, Inc.* 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980). There is no, therefore, likelihood of success on the merits in the instant case.

Metro I, 901 F.2d at 1269 n. 6.

After the Fifth Circuit affirmed dismissal of this suit in *Metro II*, this Court directed the Fifth Circuit to reconsider its decision "in light of *Federal Trade Commission v. Ticor Title Insurance*, 504 U.S.___, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992)." *Ticor* explained the two-part test that must be satisfied for state action immunity under the federal antitrust laws as previously set out in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (*"Midcal"*).

> *Ticor* noted:
>
> > A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear and affirmative policy to allow the anticompetitive conduct and second, the State provides active supervision of anticompetitive conduct undertaken by private actors.

504 U.S. ___, 112 S. Ct. at 2175, 119 L. Ed. 2d at 421 (1992).

This Court specifically noted that the first part of the *Midcal* test was not at issue in *Ticor. Id.* The Fifth Circuit correctly concluded that this Court had not made any change in the first part of the *Midcal* test. *Metro III,* 988 F.2d at 604. It was, therefore, appropriate for the court to apply the law of the case doctrine to the first prong of the *Midcal* test inasmuch as the Fifth Circuit's previous decision had not been nullified by this Court in *Ticor,* nor had there been any change in the facts. *See* 1B *Moore's Federal Practice* ¶ 0.404[1] at II-25 (1993); *Reid v. Rolling Fork Pub. Utility Dist.,* 979 F.2d 1084, 1086 (5th Cir. 1992); *Yeager's Fuel, Inc. v. Penn. Power & Light Co.,* 804 F. Supp. 700, 706 n. 8 (E.D. Pa. 1992). The first prong of the *Midcal* test was clearly and explicitly addressed by the Fifth Circuit in *Metro I,* quoted above. 901 F.2d at 1269 n. 6. As noted in *Milgard Tempering, Inc. v. Selas Corp. of America,* 902 F.2d 703, 715 (9th Cir. 1990), the ultimate question is whether a court has abused its discretion in applying the law of the case doctrine. *Milgard* noted that reconsideration of a previously decided issue is appropriate in only three instances: (1) the first decision was clearly erroneous and would result in manifest injustice; (2) an intervening change in the law has occurred; or (3) the evidence on remand was substantially different. *Milgard,* 902 F.2d at 715.

Upon remand of this case to the Fifth Circuit, there was neither intervening change in the law nor was there any different evidence concerning application of the first prong of the *Midcal* test. The question, therefore, is whether the Fifth Circuit was "clearly erroneous" in concluding that the challenged restraint was clearly articulated and affirmatively expressed as state policy. As discussed in the next section, the Fifth Circuit's conclusion concerning Texas' articulation of state policy was not clearly erroneous, but correct.

II.

THE FIFTH CIRCUIT CORRECTLY RELIED ON CLEAR TEXAS LAW IN FINDING THAT THE *MIDCAL* FIRST-PRONG ("CLEAR ARTICULATION") TEST OF STATE ACTION IMMUNITY HAD BEEN MET.

The Texas PURA clearly articulates and affirmatively expresses the policy of Texas concerning the regulation of public utilities:

> § 2. This Act is enacted to protect the public interest inherent in the rates and services of public utilities. The legislature finds that public utilities are by definition monopolies in the areas they serve; that therefore the normal forces of competition which operate to regulate prices in a free enterprise society do not operate; and that therefore utility rates, operations and services are regulated by public agencies, *with the objective that such regulation shall operate as a substitute for competition.* The purpose of this Act is to establish a comprehensive regulatory scheme which is adequate to the task of regulating public utilities as defined by this Act, to assure rates, operations, and services which are just and reasonable to consumers and to the utilities. (emphasis added)

PURA, Tex. Rev. Civ. Stat. Ann. Art. 1446c, § 2.

This is conceded by Petitioner in its brief at 7:

Texas PURA is a unique utility regulatory

> statute, for it announced new policies and provided new tools to accommodate (i) necessary regulation of dominant utilities operating in a monopoly market, on the one hand, with (ii) protections and encouragement of competitive businesses and markets, on the other hand.

PURA §18(a) further specifies the State of Texas' policy concerning telecommunications utilities:

> §18(a) It is the policy of this state to protect the public interest in having adequate and efficient telecommunications service available to all citizens of the state at just, fair and reasonable rates. The legislature finds that the telecommunications industry through technical advancements, federal, judicial and administrative actions, and the formulation of new telecommunications enterprises has become and will continue to be in many and growing areas a competitive industry which does not lend itself to traditional public utility regulatory rules, policies, and principles; and that therefore, the public interest requires that new rules, policies, and principles be formulated and applied to protect the public interest and to provide equal opportunity to all telecommunications utilities in a competitive marketplace. It is the purpose of this section to grant to the Commission the authority and the power under this Act to carry out the public policy herein stated.

SWBT is a "telecommunications utility" which is also a "dominant carrier" for purposes of PURA. PURA §§ 3(c)(2)(a) and 2(b). As such, the Texas PUC is given exclusive jurisdiction over SWBT's business and property, and SWBT is required to file proposed tariffs describing all rates, rate structures, regulations and rules before it may offer service to the public. PURA §§ 18(a) and (b). The Texas PUC reviews SWBT's operations and allows such rates, rate structures and regulations to become effective only if they are just, fair and reasonable and comply with the public interest. *Id.* If the Texas PUC, after investigation, concludes the tariff of a dominant carrier (such as SWBT) doesn't comply with PURA, the PUC may order the tariff canceled, or modified. PURA §§ 16(a), 37, 42, 43(f). It is unlawful for SWBT to charge rates not authorized by its approved tariffs. PURA § 31.

The Texas PUC has and exercises quasi-judicial powers: The PUC holds hearings, administers oaths, receives evidence at hearings, issues subpoenas to compel attendance of witness and production of papers and documents, grants interim relief, and makes findings of fact and decisions with respect to administering the provisions of PURA. PURA § 16(a). Persons affected by conduct of a public utility may (and do) file complaints (as USM has done in Texas PUC Docket 9090) (PURA § 83(a)); an affected person may complain of any alleged anticompetitive or discriminatory practices of a public utility. PURA § 47. The PUC may enjoin violations of its regulations through legal action brought by the Texas Attorney General (PURA §§ 71-77), and appeals from PUC orders may be taken to the state district courts. PURA § 69.

This detailed statutory scheme for regulating public utilities such as SWBT clearly meets *Midcal's* first prong "clear articulation" test. The arguments in Section 2 of USM's petition concerning the legislative intentions embodied in PURA do nothing but provide further evidence of the Texas regulatory

scheme.[5] The Fifth Circuit's evaluation of the first prong of *Midcal* was correct.

III.

WHETHER VIEWED AS AFFIRMING A DISMISSAL UNDER FED. R. CIV. P. RULE 12(b)(6) OR A SUMMARY JUDGMENT UNDER RULE 56, THE FIFTH CIRCUIT'S HANDLING OF THE APPEAL ON REMAND WAS CONSISTENT WITH DECISIONS OF THE OTHER FEDERAL CIRCUITS AND DID NOT PREJUDICE PETITIONER USM.

Petitioner's first and fifth points really raise the same issue, namely that the Fifth Circuit converted Respondent's Rule 12(b)(6) Motion to Dismiss into a Motion for Summary Judgment without providing Petitioner notice and opportunity to respond. (*See*, USM's Brief at 8-10 and 26-28).

Procedurally, after initial proceedings in which the district court denied USM's Motion for Preliminary Injunction, the district court granted SWBT's Motion to Dismiss for failure to state a claim on the ground that the state action doctrine immunized Respondent's conduct.[6] The district court's *dismissal* was affirmed by the Fifth Circuit in its October 23, 1991 Order. (*Metro II*,

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5. USM's arguments in Section 2 of its brief concerning how PURA should be interpreted and how the PUC is to implement PURA are irrelevant. In determining the applicability of state-action immunity, the question "is not how well state regulation works but whether the anticompetitive scheme is the State's own." *Ticor*, 504 U.S.___, 112 S. Ct. at 2177, 119 L. Ed. 2d at 423.

6. The Fifth Circuit noted that this case came from the district court "with an extensive record, developed in detail during the proceedings for injunctive relief." *Metro III*, 988 F.2d at 603.

Appendix D to Petitioner's Brief.) After remand by this Court, the Fifth Circuit again affirmed that the district court's *dismissal* of USM's claim was correct and affirmed that dismissal. (*Metro III*, Appendix A to USM's Brief.)

First, USM incorrectly contends immunity is an affirmative defense that may not be raised in a Motion to Dismiss. An affirmative defense such as immunity may properly be considered under Fed. R. Civ. P. Rule 12(b)(6) as a Motion to Dismiss for failure to state a claim. *Quezada v. County of Bernalillo*, 944 F.2d 710 (10th Cir. 1991); *Jackson v. Taylor*, 539 F. Supp. 593 (D.D.C. 1982), *aff'd*, 713 F.2d 865 (D.C. Cir. 1983); *Tri-State Rubbish, Inc. v. Waste Management, Inc.*, 803 F. Supp. 451 (D. Me. 1992), *aff'd in part and remanded in part*, __ F.2d __, 1993 WL 245976 (1st Cir. July 13, 1993); *Aerotrade, Inc. v. Republic of Haiti*, 376 F. Supp. 1283 n. 7 (S.D.N.Y. 1974). This is especially true where the opposing party raises no genuine issues of material fact. *Scott v. Kuhlman*, 746 F.2d 1377 (9th Cir. 1984).

Liffiton v. Keuker, 850 F.2d 73 (2nd Cir. 1988), cited by USM, is distinguishable. *Liffiton* held an immunity defense would not support dismissal when further factual information was necessary. As demonstrated in point 4 of this brief, USM can prove no set of facts that would show that Texas does not have a clearly articulated regulatory policy, or that the Texas PUC is not actively regulating the specific conduct of SWBT at issue.

In affirming the dismissal based on state action immunity, the Fifth Circuit took judicial notice of matters of public record and Petitioner had ample opportunity to respond and submit responsive materials.

Concerning the first prong of the *Midcal* state action immunity test, the Fifth Circuit concluded the challenged restraint was clearly articulated and affirmatively expressed as state policy

by reference to state statutory language. (*Metro III*, 988 F.2d at 605). The district court's initial Memorandum Order (Appendix H) specifically referenced the articulation of the Texas policy as embodied in PURA:

> Texas has clearly articulated a policy to regulate telephone rates. In § 18 of the Public Utility Regulatory Act ("PURA"), Tex. Rev. Civ. Stat. Art. 1446(c) (Vernon Supp. 1989), the legislature has stated that there is a policy of overseeing the telecommunications industry so as to promote competitiveness and that the Public Utility Commission ("PUC") shall regulate all telecommunications rates so as to ensure that they are just, fair, and reasonable. The statute also provides that the PUC shall have exclusive original jurisdiction over the business and property of the telecommunications utilities. *Id.* Moreover, § 18(c)(2) provides that the PUC shall investigate as needed to ensure competitiveness within the telecommunications market. Likewise, § 37 provides that the PUC shall set rates, and § 43 states that no utility may make any rate changes unless the PUC approves them. Thus, the challenged activity, namely the setting of lower rates for RCC-DID service and much higher rates for General Access Service, has been undertaken pursuant to state policy.

(Appendix p. H4 to USM's Brief.)

The Fifth Circuit's analysis of the second prong of the *Midcal* test similarly relied on matters of public record appropriate for judicial notice: the Texas PURA and a variety of reported Texas PUC decisions concerning PUC regulation of the activities of

SWBT. *Metro III,* 988 F.2d at 606. In addition to the public record, the court of appeals noted that the record in this case "reflects numerous references to the PUC's inquiry into the reasonableness of Bell's rates, in Docket 8585 filed January 4, 1989." *Id.* Finally, the Fifth Circuit noted:

> Most importantly, Metro [USM] and Bell [SWBT] filed a joint pleading recognizing that, while this suit was pending, the PUC was adjudicating the *very same issues* presented in the instant case. In fact, the very same attorneys participated in the state proceedings in January 1992. It is ludicrous, almost to the point of frivolity, for Metro to contend that the PUC does not actively supervise the conduct in question given the fact that Metro and Bell are awaiting a PUC decision on Bell's actions "as we speak."

988 F.2d 606-607. (*See also,* Appendix R, setting forth the ALJ's statement of issues pending in Dkt. 9090 before the Texas PUC.)

The Fifth Circuit's consideration of these matters of public record was appropriate. In a motion for judgment on the pleadings, or in a motion to dismiss pursuant to Rule 12(b), the Court may take judicial notice of additional facts where appropriate without converting the proceeding into a Rule 56 Motion for Summary Judgment. *MGIC Indemnity Corp. v. Weisman,* 803 F.2d 500, 504 (9th Cir. 1986); *United States v. Woods,* 925 F.2d 1580 (7th Cir. 1991); *Southmark Prime Plus, L.P. v. Falzone,* 776 F. Supp. 888, 891-92 (D. Del. 1991). Among the matters a court may judicially notice are records and reports of administrative bodies, such as the Texas PUC and matters of general public record. *Intermedics, Inc. v. Ventritex, Inc.,* 775 F. Supp. 1258, 1261 (N.D. Cal. 1991) (citing *Interstate Natural Gas Co. v. Southern California Gas Company,*

209 F.2d 380, 385 (9th Cir. 1953)); *Tri-State Rubbish, Inc. v. Waste Management, Inc.*, 803 F. Supp. 451, 455-56 (D. Me. 1992); *Yeater's Fuel, Inc. v. Penn. Power & Light Co.*, 804 F. Supp. 700, 707-10 (E.D. Pa. 1992); *Southmark Prime Plus, L.P. v. Falzone*, 776 F. Supp. 888, 892 (D. Del. 1991).

Even were USM entitled to notice that this matter was to be considered as an appeal from a ruling on a Rule 56 motion for summary judgment[7], there is no error because USM had been given full opportunity to address the matters relied on by the court. The Texas statutory and administrative records noticed by the Fifth Circuit were also cited in Petitioner's pleadings at the district court, in its appellate briefs in the Fifth Circuit; in its initial 1991 Petition for Writ of Certiorari in this Court; and in its detailed "Plaintiff's Brief, Proposed Findings of Fact and Conclusions of Law and Supporting Evidence," filed with the district court on August 4, 1989. Given Petitioner's extensive briefing of the state immunity issues, Petitioner cannot contend it was taken by surprise or deprived of a reasonable opportunity to submit materials outside the pleadings. *See, e.g., In re G. & A. Books, Inc.*, 770 F.2d 288, 295 (2d Cir. 1985), *cert. den., MGM Exhibitors, Inc. v. Stern*, 475 U.S. 1015 (1986); *Kaestel v. Lockhart*, 746 F.2d 1323, 1324 (8th Cir. 1984); and cases cited in *2A Moore's Federal Practice*, ¶ 12.09[3], p. 12-80, n. 8 and 1992-1993 cumulative supplement, pp. 168-175.

The district court did not abuse its discretion and correctly dismissed USM's action without further discovery or proceedings because the judicially noticed facts were clear. Further proceedings would have been futile and a waste of judicial

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7. Note the status of the *record below* is that the Fifth Circuit obtained stipulations from the parties to review the case "as thought it were before us on appeal from the grant or denial of a summary judgment motion." *Metro III*, 988 F.2d at 603.

resources. *Mullis v. U. S. Bankruptcy Court for Dist. of Nev.*, 828 F.2d 1385, 1387 n. 6 (9th Cir. 1987), *cert. denied*, 486 U.S. 1040 (1988). USM has failed to show that further proceedings in this case would somehow lead to the discovery of issues of material fact, or to a different result. *R. Ernest & Cohn, D.C., D.A.B.C.O. v. Bond*, 953 F.2d 154, 159 (4th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 3057, 120 L. Ed. 2d 922 (1992); *Taylor v. Sentry Life Ins. Co.*, 729 F.2d 652, 656 (9th Cir. 1984); *Pub. Srvc. Co. of New Hampshire v. Hudson Light and Power Dept.*, 938 F.2d 338, 346 (1st Cir. 1991).

USM's contention (USM's Brief at 9) that dismissal or summary judgment cannot be based on the record in a preliminary injunction proceeding and the cases USM cites are inapposite. *Kennedy v. City of Cleveland*, 797 F.2d 297 (6th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987), does not even deal with such an issue. *University of Texas v. Camenisch*, 451 U.S. 390 (1981), dealt with the question of the appeal of issues becoming moot after a preliminary injunction was issued, versus the appellate review of issues preserved by the injunction bond on a permanent injunction. *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618 (5th Cir. 1985) merely discusses the standards for injunctive relief. *Conley v. Gibson*, 355 U.S. 41 (1957), in fact recognizes that a claim may be dismissed for failure to state a claim when it appears "beyond doubt" that the claimant can prove no facts entitling him to relief. *Conley*, 355 U.S. at 45-46.

This case did not turn on any distinction between the tests for issuing an injunction versus dismissal versus summary judgment. Dismissal of USM's suit was based on the fact the record established beyond question that Texas has a clearly articulated regulatory policy applicable to the conduct in question, and that, in Docket 9090, the Texas PUC is actively regulating the very conduct at issue in the suit that was dismissed. Whether viewed as a dismissal under Rule 12(b)(6), or as a summary judgment under Rule 56, the result below is correct.

The lower court's function was to determine whether there was a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). Review of PURA, the reported Texas PUC decisions, and Texas PUC Docket 9090 demonstrated that there can be no *genuine* issue of fact that both prongs of the *Midcal* test are satisfied. The Fifth Circuit's decision is clearly supported by the record and USM has not offered any significant probative evidence contradicting the result below. Judgment dismissing the complaint was proper. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Where, as here, "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec.* case, *supra*, 475 U.S. 574, 587 (1986); *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968).

The dismissal of USM's complaint was procedurally correct. Reliance by the courts below on matters appropriate for judicial notice did not convert SWBT's motion to dismiss into a summary judgment motion. Even if the Fifth Circuit considered this case as an appeal from the granting of summary judgment in SWBT's favor, there is no error because USM had full opportunity to respond, and did in fact submit materials outside the pleadings. The record below is clear that USM has no cause of action against SWBT under the *Midcal* test.

IV.

THE FIFTH CIRCUIT CORRECTLY CONCLUDED THAT THE SPECIFIC CONDUCT COMPLAINED OF BY PETITIONER IS BEING ACTIVELY REGULATED BY THE TEXAS PUC.

USM argues the conduct in question has not been regulated by the State of Texas. USM asserts the regulation of SWBT's conduct

by the PUC goes no further than the setting of Respondent's rates. (USM's Brief, pp. 16-19, 22-26). In fact, however, the Texas PUC is specifically regulating the exact conduct of SWBT that is the subject of USM's complaint.

The active supervision of SWBT's activities by the Texas PUC is clear. Citing numerous reported Texas PUC decisions concerning SWBT, the Fifth Circuit correctly concluded that the Texas PUC actually and actively supervises the policies embodied in PURA. *Metro III*, 988 F.2d at 606-07.

The Texas PUC's supervision of SWBT goes well beyond the general; the PUC is directly involved in addressing the same issues raised by USM in the district court. USM's basic complaint before the district court was that SWBT is threatening to cut off telephone lines USM uses to provide its metro service. (USM's Statement of the Case, Brief, p. 2). As the court of appeals noted, this identical issue is before the Texas PUC in Docket 9090. *Metro III*, 988 F.2d at 606. Order No. 8 (Appendix R) in Texas PUC Docket 9090, establishes as the specific issues in the Complaint Case:

(1) Whether U.S. Metroline is in violation of the tariffs under which it is receiving service from SWB;

(2) Whether the relevant provisions of those tariffs are unreasonable or in any way in violation of any provision of law, within the meaning of PURA, § 42;

(3) If the answers to the first two questions are in SWB's favor, whether SWB should be permitted to terminate USM Metroline's existing service under those tariff provisions pursuant to P.U.C. Subst. R. 23.46.

Not only are the "very same issues" before the Texas PUC; that agency has granted USM interim relief prohibiting SWBT

from terminating USM's service while Docket 9090 is pending, and requiring that SWBT provide new telephone lines and numbers to USM upon request. *(See*, Appendix Q).

It is hard to envision more active supervision that clearly meets the *Ticor* requirements. Because SWBT is subject to the jurisdiction and control of the Texas PUC, it cannot terminate Petitioner's service unless and until the issues in Texas PUC Docket 9090 are resolved in its favor and the interim relief granted Petitioner is dissolved. Docket 9090 is still pending before the PUC (*see*, Appendix S), and USM is still receiving the service which is at issue in Docket 9090 and in this case. Clearly, the Texas PUC is actively enforcing a regulatory scheme fully compliant with the second prong of *Midcal*, as expanded upon in *Ticor.*

V.

CERTIORARI IS NOT APPROPRIATE TO REVIEW INFERIOR COURTS' ANALYSIS OF THE FACTS.

Based on matter appropriate for judicial notice and "an extensive record, developed in detail during the proceedings for injunctive relief" (*Metro III*, 988 F.2d at 603), the district court and the Fifth Circuit both concluded that both prongs of the *Midcal* test had been met. Certiorari is not appropriate to review findings of fact. *N.L.R.B. v. Hendricks Cty. Rural Electric Corp.*, 454 U.S. 170, 176 n. 8 (1981); *United States v. Johnston,* 268 U.S. 220, 227 (1925). In this case, both the district court and the Fifth Circuit made concurrent fact findings that both prongs of the *Midcal* test had been made, leading to the legal conclusion that SWBT's conduct was immune under the state-action doctrine. Absent a very obvious and exceptional showing of error, this Court does not normally review such findings of fact. *Graver Tank & Mfg. Co. v. Linde Air Products D. Co.*, 336 U.S. 271, 275 (1949); *United States v. Doe*, 465 U.S. 605, 614 (1984); *Berenyi v. District Director,*

Immigration and Naturalization Service, 385 U.S. 630, 635 (1967); *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 98 n. 15 (1984). Apart from making allowance for expected adversarial zeal on the part of USM's counsel, there is no room for doubt the findings of the courts below are correct concerning the *Midcal* test.

VI.

THE AFFIDAVITS SUBMITTED BY USM, WHILE IRRELEVANT, ARE NOT APPROPRIATELY CONSIDERED BY THIS COURT BECAUSE THEY WERE NOT PART OF THE RECORD BELOW.

USM has submitted affidavits of its counsel (Appendix N) and that of Mr. Taylor (Appendix O) asserting that, contrary to the Fifth Circuit's express language, USM did not stipulate that this case could be viewed as an appeal from the grant or denial of a summary judgment motion. USM counsel's affidavit also accuses one of the Fifth Circuit judges of stating his willingness to ignore *Ticor* precedent. Given the issue at hand, namely, that the Fifth Circuit correctly applied *Ticor,* and that dismissal and judgment for SWBT was clearly appropriate based on the record, these affidavits are no more than a curiosity. However, SWBT suggests to the Court that such affidavits are not appropriate for consideration because they were first introduced to the Supreme Court, and are "not in the record of the proceedings below." *FW/PBS v. City of Dallas*, 493 U.S. 215, 235 (1990). The affidavits should, except for their novelty value, be stricken and ignored. *Russell v. Southard,* 12 How. 139, 158-59 (1851); *Hopt v. Utah,* 14 U.S. 488, 491-92 (1885).

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX Q — DOCKET 9090, ORDER NO. 4

DOCKET NO. 9090

PUBLIC UTILITY COMMISSION OF TEXAS

COMPLAINT OF DFW METRO LINE SERVICES AGAINST SOUTHWESTER BELL TELEPHONE COMPANY

ORDER NO. 4
PREHEARING ORDER AND NOTICE OF HEARING

A prehearing conference was held in this docket on November 30, 1989. The following persons entered appearances at the conference: Mr. Ray G. Besing for DFW Metro Line Services (DFW Metro Line), Mr. Richard Billeaud for Southwestern Bell Telephone Company (SWB), and Ms. Pamela J. Mabry and Mr. Stephen Morris for the Commission's General Counsel, in the public interest. After negotiations, the parties were able to agree upon the granting of interim relief, subject to certain conditions, and upon procedures and a schedule to govern this proceeding. Pursuant to that agreement and P.U.C. PROC. R. 21.83(c), the ALJ issues the following order.

I. Interim Relief

DFW Metro Line's request for interim relief is GRANTED under the conditions set forth below. While this complaint is pending before the Commission, SWB shall not terminate service to DFW Metro Line and shall provide new telephone lines and numbers to DFW Metro Line upon request. The granting of interim relief is conditioned upon DFW Metro Line's obtaining as security a letter of credit in the amount of $50,000.00, payable to SWB in the event SWB prevails in this dispute. The original letter of credit shall be delivered to SWB by 5:00 p.m. December 8, 1989. A copy

of the letter of credit shall be delivered to the Commission's General Counsel and five copies filed with the Commission's filing clerk. The interim relief granted herein, including procedures for collection on the letter of credit in the event SWB prevails on the merits in this case, shall be governed by Tex.R.Civ.P. 680 *et seq.* and other relevant statutes and rules.

If DFW Metro Line has not been able to secure the letter of credit, the parties shall file a written pleading informing the ALJ of that fact by 4:00 p.m. December 11, 1989. In that event, the interim hearing will be reconvened at 10:00 a.m. December 14, 1989, for the taking of evidence on DFW Metro Line's request for interim relief.

II. Hearing Schedule and Filing Deadlines

A. Hearing on the Merits

The hearing on the merits will commence at 10:00 a.m. Monday, April 9, 1990, at the Commission's offices, 7800 Shoal Creek Boulevard, Austin, Texas.

B. Discovery

1. Requests for Information shall be filed by 4:00 p.m. Friday, March 16, 1990.

2. Depositions shall be taken no later than Monday, April 2, 1990.

3. Additional documents or information requested in the course of depositions shall be supplied by 4:00 p.m. Thursday, April 5, 1990.

4. Objections to RFIs shall be filed within seven working days of receipt of the RFI. Motions to compel shall be filed with five working days of receipt of the objection to the RFI in question. The parties shall make good faith efforts to resolve their disputes by discussion and negotiation before filing objections and motions to compel.

C. Testimony and Motions to Strike

1. DFW Metro Line shall prefile its direct testimony and exhibits by 4:00 p.m. Friday, January 26, 1990.

2. SWB shall prefile its direct testimony and exhibits by 4:00 p.m. Friday, March 2, 1990.

3. The General Counsel shall prefile his direct testimony and exhibits by 4:00 p.m. Monday, March 26, 1990.

4. DFW Metro Line shall prefile its rebuttal testimony and exhibits by 4:00 p.m. Friday, April 6, 1990.

5. Motions to strike portions of a party's direct testimony shall be filed by 4:00 p.m. Thursday, April 5, 1990. Responses to motions to strike and objections to rebuttal testimony may be made orally at the hearing on the merits. The ALJ will not consider oral objections to timely-filed direct testimony.

SIGNED AT AUSTIN, TEXAS, on this the *1st* day of December, 1989.

PUBLIC UTILITY COMMISSION OF TEXAS

s/ Henry D. Card
HENRY D. CARD
ADMINISTRATIVE LAW JUDGE

APPENDIX R — DOCKET 9090, ORDER NO. 8

DOCKET NO. 9090

PUBLIC UTILITY COMMISSION OF TEXAS

COMPLAINT OF DFW METROLINE SERVICES AGAINST SOUTHWESTERN BELL TELEPHONE COMPANY

ORDER NO. 8
GRANTING MOTION TO ESTABLISH PROCEDURAL SCHEDULE, RULING ON SCOPE, AND GIVING NOTICE OF PREHEARING CONFERENCE

After a lengthy period of abatement, Southwestern Bell Telephone Company (SWB), the respondent in this case, filed a Motion to Establish a Procedural Schedule Leading to a Hearing on the Merits. The complainant, U.S. Metro Line Services, Inc.,[1] opposes the motion. This order grants SWB's motion and rules on the scope of the proceeding.

The gist of U.S. Metro Line's argument is that it is presently involved as an intervenor in Docket Nos. 9618, 9640, and 9796. The scope and definition of "local exchange service" will be addressed in those dockets and in the staff's pending rulemaking Project No. 9708. Docket Nos. 9618 and 9640 are presently abated until Docket No. 9796 is decided.

Part of U.S. Metro Line's complaint is that it is illegal for SWB to attempt, through its tariffs, to restrict local exchange service to the detriment of its competitors. Therefore, according to U.S. Metro Line, it would be wasteful to reactivate this case until

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1. Since the complaint was filed, DFW MetroLine Services, a partnership, has become U.S. Metro Line Services, Inc.

the definition of local exchange service is determined in Docket 9796, the other dockets, and/or the rulemaking. U.S. Metro Line also points out that it has limited resources and cannot afford to actively participate in this docket and the other proceedings.

SWB agrees that the definition of local exchange service will be clarified in the other proceedings. According to SWB, however, that definition is not at issue here. The real issue, according to SWB, is whether U.S. Metro Line is illegally providing service in ways contrary to the tariffs under which it is receiving service. SWB contends that U.S. Metro Line is wrongfully using the Radio Common Carrier and Centrex tariffs to provide interexchange service that should be taken under SWB's access service tariff.

In order to rule on this issue, the ALJ must determine the scope of Docket No. 9796 and the scope of this docket.

The scope of Docket No. 9796 was set forth in Examiner's Order No. 4 in that case:

> From a review of the pleadings the examiner has determined that the issues in this docket are: 1) whether the four named respondents are providing local exchange service as defined in the current Commission rule; and 2) whether the four named respondents should be required to cease and desist their operations until they obtain a certificate of convenience and necessity from the Commission. All other issues shall be deferred for consideration in Docket No. 9618, the generic proceeding.

U.S. Metro Line is not one of the four named respondents in

Docket No. 9796. Nevertheless, its point would be well taken if it were in the same situation as those respondents, so that its fate would be determined by the decision in Docket No. 9796. It is not in the same situation, however. Although SWB is seeking to cut off U.S. Metro Line's existing service, SWB is not claiming that U.S. Metro Line should be certificated as a local exchange carrier. Instead SWB is claiming that U.S. Metro Line is providing interexchange service between Dallas and Fort Worth, in violation of the tariffs under which it receives service from SWB. Neither U.S. Metro Line's situation nor SWB's reaction to it are the same as in Docket No. 9796.

The ALJ finds that the issues in this complaint case, Docket No. 9090, are as follows:

> 1) Whether U.S. Metro Line is in violation of the tariffs under which it is receiving service from SWB;
>
> 2) Whether the relevant provisions of those tariffs are unreasonable or in any way in violation of any provision of law, within the meaning of PURA Section 42;
>
> 3) If the answers to the first two questions are in SWB's favor, whether SWB should be permitted to terminate U.S. Metro Line's existing service under those tariff provisions pursuant to P.U.C. SUBST. R. 23.46.

Because the issues in this complaint are not the same as those raised in the other pending dockets in which U.S. Metro Line is involved, SWB's motion is GRANTED. Pursuant to P.U.C. PROC. 21.83, a prehearing conference will be held in this docket beginning at 10:00 a.m. Wednesday, July 24, 1991. The following matters will be considered at the prehearing conference:

Appendix R

1) resolution of pending motions:

2) establishment of procedural schedule, including deadlines and procedures for discovery and the prefiling of testimony;

3) setting of the hearing on the merits.

SIGNED AT AUSTIN, TEXAS, on this the *3rd* day of July, 1991.

PUBLIC UTILITY COMMISSION OF TEXAS

s/ Henry D. Card
HENRY D. CARD
ADMINISTRATIVE LAW JUDGE

APPENDIX S — DOCKET 9090, ORDER NO. 36

DOCKET NO. 9090

PUBLIC UTILITY COMMISSION OF TEXAS

COMPLAINT OF U.S. METRO LINE SERVICES, INC. AGAINST SOUTHWESTERN BELL TELEPHONE COMPANY

ORDER NO. 36

REQUIRING ADDITIONAL INFORMATION REGARDING SOUTHWESTERN BELL TELEPHONE COMPANY'S MOTION FOR INTERIM RELIEF AND TO REOPEN THE RECORD AND DENYING IN PART AND GRANTING IN PART U.S. METROLINE'S MOTION FOR INTERIM RELIEF

On May 10, 1993, Southwestern Bell Telephone Company (SWB) filed its Motion for Interim Relief and to Reopen the Record in this docket. U.S. Metroline Services, Inc. (USM) replied to that motion on May 19, 1993, and filed its own Motion for Interim Relief, to which SWB responded on May 28.

The ALJ does not have adequate information to rule on SWB's motion. Therefore the parties SHALL FILE their answers to the questions set forth below by 3:00 p.m. Monday, June 28, 1993. Pleadings in response to those answers shall be filed no later than 3:00 p.m. Wednesday, July 7, 1993. In addition, General Counsel is ordered to respond to SWB's motion, and to the answers required by this order, by 3:00 p.m. Wednesday, July 7, 1993.

USM's Motion for Interim Relief is DENIED IN PART AND GRANTED IN PART. SWB shall provide Call Transfer-Individual to USM in accordance with SWB's tariff and the representations

contained in SWB's May 28th reply to USM's motion. SWB shall not be required to provide Call Transfer Disconnect.

SWB's Motion for Interim Relief and to Reopen the Record

USM provides what it calls "metro service" and what SWB calls "interexchange service" between the Dallas and Fort Worth metropolitan areas. In its motion, SWB complains that an unnamed interexchange carrier (IXC) is completing both intraLATA and interLATA long distance calls through USM's facilities. Acting on a complaint from a competing IXC, SWB personnel tested two customer-owned coin telephones in Dallas by placing calls over those phones and auditing the lines at the central office that serves them. According to the affidavit of SWB manager Daniel L. Poole, an intraLATA call to Denton and an inter LATA call to San Antonio were placed via internal dialers over one of the Centrex station line numbers assigned to USM.

The parties' pleadings have left the ALJ unclear on certain technical questions and on the significance of the alleged use of USM's facilities to complete calls beyond the Dallas-Fort Worth metropolitan area. The ALJ is loathe to decide about reopening the record in this case without a firmer grasp of those matters. Therefore the parties are ordered to answer the following questions, and to reply to those answers, within the deadlines set forth above:

SWB shall respond to the following questions:

1. SWB is complaining that intraLATA and interLATA long distance calls are being completed over Centrex numbers assigned to USM. Would the use of USM's lines for that purpose eliminate or reduce the access charges payable by the IXC to SWB? If so,

please explain. If not, how does that alleged use of USM's lines benefit the IXC or harm SWB or competing IXCs?

2. USM has replied that each of the Centrex lines leased by USM from SWB has a standard toll restriction feature that prevents a user from completing a long distance or toll call over those lines. Please respond.

USM shall respond to the following questions:

1. Does USM believe that its switch or the restrictions on its Centrex lines preclude calls from being placed and routed in the manner described in Mr. Poole's affidavit? In other words, does USM contend that the matters averred to in that affidavit are technically impossible?

2. USM has responded that its switch does not permit any of its metro service customers to complete calls over its service beyond the boundaries of the Dallas metropolitan exchange area and Fort Worth metropolitan exchange area. If calls can, in fact, be completed as described by Mr. Poole, does USM agree that such a use of its system is improper and should be discontinued?

3. Please explain more fully the toll restriction feature that prevents any user from completing a long distance or toll call over USM's Centrex lines.

USM's Motion for Interim Relief

Order No. 4 in this case requires SWB to provide new lines and numbers to USM upon request. USM complains that SWB has failed to provide two features — Call Transfer-Individual and Call Transfer Disconnect — in conjunction with those new lines and

that its failure to do so discriminates against USM.

Call Transfer-Individual allows the station user to transfer an incoming call to any other Centrex station. According to SWB, it has never failed to provide Call Transfer-Individual, which is a standard feature of Centrex and is provided without charge on every Centrex line. SWB would have to take special action to block the service and can find no indication that any such special procedures have been undertaken.

Although the parties inexplicably disagree as to what is occurring with Call Transfer-Individual, they agree that USM is entitled to receive the feature. SWB is ORDERED to provide Call Transfer-Individual with the lines it provides to USM. To that extent, USM's motion is GRANTED.

Call Transfer Disconnect (CTD), which is offered with SWB's PLEXAR I service, allows the customer to transfer calls outside that system. Under SWB's PLEXAR I tariff, CTD is not available to EMS or EACS customers and cannot be used to expand a local calling scope. According to SWB, it formerly provided the feature on a special assembly basis to some Centrex customers, but ceased processing such requests after discovering that CTD could be used with optional EMS to expand calling scopes.

With regard to Call Transfer Disconnect, USM's motion is DENIED. The ALJ agrees that SWB is not discriminating unreasonably in its provision of CTD. Nor is the provision of that feature required under its Centrex tariff offering. Moreover, Order No. 4, which was designed to ensure that USM could continue to operate and receive new lines during the pendency of this docket, does not require SWB to provide Call Transfer Disconnect.

SIGNED AT AUSTIN, TEXAS the *18th* day of June 1993.

Appendix S

PUBLIC UTILITY COMMISSION OF TEXAS

s/ Henry D. Card
HENRY D. CARD
ADMINISTRATIVE LAW JUDGE

APPENDIX T — PLAINTIFF'S ORIGINAL PETITION

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS

____ JUDICIAL DISTRICT

U.S. METROLINE SERVICES, INC.

PLAINTIFF

v.

SOUTHWESTERN BELL TELEPHONE COMPANY, MONA FRAME, AND JOHN IVEN

DEFENDANTS

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, U.S. METROLINE SERVICES, INC. ("Plaintiff") and files its Original Petition, complaining of Defendant Southwestern Bell Telephone Company ("SWB" or "Bell"), and for causes of action will respectfully show the court the following:

PARTIES

1. Plaintiff U.S. Metroline Services ("Metroline") is a corporation organized under the laws of the State of Texas, having its principal office and place of business in Dallas, Texas.

2. Defendant Southwestern Bell Telephone Company, is a corporation organized under the laws of the State of Missouri and

may be served with process through its registered agent Robert M. Lynch, 203 S. Akard, Room 3706, Dallas, Texas, 75202.

3. Defendant Mona Frame ("Frame") is a resident of Dallas County, Texas and may be served with process at her residence address, 2329 Apple Valley, Garland, Texas.

4. Defendant John Iven ("Iven") is a resident of Tarrant County, Texas and may be served with process at his residence address, 124 Kay Court, Hurst, Texas 76054.

JURISDICTION

5. Jurisdiction is proper in this Court because the amount in controversy, exclusive of interest and costs is within the jurisdictional limits of this Court.

VENUE

6. Venue is proper in Dallas County pursuant to Section 15.001 of the Texas Civil Practice & Remedies Code, because Plaintiff's causes of action accrued, in whole or in part, in Dallas County.

FACTS

7. Plaintiff provides communications services, including what is commonly known as "metro service" (a toll-free calling service), within the Dallas-Ft. Worth metroplex, in direct competiton with Defendant.

8. Defendant Bell provides, among other communication services, Extended Metropolitan Service or "EMS," which is the

same service that Plaintiff provides. In providing its EMS in the Dallas-Ft. Worth metroplex, Defendant provides and offers its service to the same customer group and within the same geographical area in which Plaintiff provides its service. Defendant also provides its EMS service in other similar metropolitan areas in the states of Texas, Oklahoma, Arkansas, Kansas and Missouri.

9. Defendants Frame and Iven were, at all time pertinent hereto, agents, servants and employees of Defendant Bell, and were at all times acting within the course and scope of their employment with, and under the direction of, Defendant Bell. These Defendants' wrongful conduct is outlined in paragraph 13 below. All other references to "Defendant," in the singular, are intended to refer to Defendant Bell and, where applicable, also to Defendants Frame and Iven.

10. Before Plaintiff's genesis, the entrepreneurs who formed Plaintiff had recognized the need for a technologically innovative and less expensive extended area metropolitan calling service within the Dallas-Ft. Worth metroplex and other areas in the United States, including Missouri, Kansas, New York, Florida and California, some of which are markets in which Defendant also markets its metro service.

11. In order to provide a metro service, essential facilities such as telephone lines and numbers are required. Defendant owns and controls these technical components of the service. In order for Plaintiff to provide its metro service, it must obtain telephone lines, numbers and listings from Defendant, as Defendant has exclusive control over these facilities and the duplication of those facilities is not economically feasible.

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12. Beginning in approximately early, 1988, Plaintiff began providing metro service, using facilities ordered from Defendant in 1987, 1988, and 1989.

13. Nearly a year and a half after Plaintiff had begun operations and had incurred substantial start-up expenses and other obligations, Defendants Frame and Iven, on behalf of Defendant Bell, wrote a letter to Plaintiff dated June 8, 1989 and received by Plaintiff on June 12, 1989, threatening to terminate the services Bell had been providing Plaintiff for Plaintiff's metro service. Defendants have admitted that the reason for the threat was because Plaintiff was taking away some of Defendant Bell's metro service customers. Prior and subsequent to that "termination notice" letter of Defendants, Plaintiff attempted to dissuade Defendants from disconnecting the essential facilities — the Bell lines and numbers — needed for Plaintiff to stay in business. Defendants adamantly refused to reconsider and have, to the present, continued to threaten the disconnection of said lines and termination of said numbers.

14. Defendants have continued, on several occasions and as recently as May, 1993, to deprive or attempt to deprive Plaintiffs of essential and needed telephone facilities, features and services, in a continuing effort to impair and injure Plaintiff's business.

COUNT I

TEXAS ANTITRUST ACT § 15.05(b)

15. Defendant is the only provider of local exchange service in the Dallas-Ft. Worth exchange. Therefore, defendant is a monopoly, as that term is defined by law, and possesses monopoly power over local telephone services.

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16. In an attempt to preserve its monopoly position in the provisioning of local exchange services, and in particular metro service, Defendant has threatened, and continues to threaten, to terminate all the essential facilities it currently provides to Plaintiff, thereby threatening to effectively put Plaintiff out of business, permanently, at the moment of disconnection. Such acts constitute SWB's attempt to maintain its monopoly and are in violation of Section 15.05(b) of the Texas Free Enterprise and Antitrust Act of 1983, which provides that "it is unlawful for any person to monopoly, attempt to monopolize, or conspire to monopolize any part of trade or commerce." Tex. Bus. & Com. Code Ann. § 15.05(b).

17. Since Defendant's original threat to terminate Plaintiff's service, Defendant has engaged in other conduct that also violates § 15.05(b), including intentional refusals and delays in providing essential lines, facilities, features and numbers needed in Plaintiff's business.

18. Defendant has also refused to provide certain features which Plaintiff's customers have requested, which Defendant has the capability to provide on the lines it provides Plaintiffs, and which Defendant provides to customers other than Plaintiff, all in violation of § 15.05(b).

19. All of the above acts have been committed knowingly by Defendant.

20. Defendant's above-described conduct was and is the producing and proximate cause of damages to Plaintiff.

21. As a direct result of Defendant's conduct, Plaintiffs had to retain the undersigned attorneys to pursue this cause of action.

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Pursuant to Section 15.000 *et. seq.* of the Texas Free Enterprise & Antitrust Act of 1983, all attorney's fees that are reasonable and necessary in this cause, including any appeal, may be recovered by Plaintiffs.

COUNT II

NEGLIGENCE

22. Defendant's conduct is negligent and grossly negligent. Defendant and its agents failed to perform with ordinary care their contractual and common law duties to Plaintiffs. Defendant has displayed conscious and reckless disregard for Plaintiff's rights. Such conduct is a proximate cause of Plaintiff's above-described damages.

COUNT III

NEGLIGENT MISREPRESENTATION

23. Defendant's conduct constitutes negligent misrepresentation. Defendant failed to perform with ordinary care its contractual and common law duties to Plaintiffs. Specifically, Defendant knew or should have known, or were grossly negligent when they represented that the services Defendant agreed to provide Plaintiff would in the future, be available for Plaintiff's metro service business, and could be used for Plaintiffs' intended purpose.

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COUNT IV

FRAUD

24. Defendant has made a number of representations of material facts with respect to the lines, facilities, and services it has provided or agreed to provide to Plaintiff, including the representation that Defendant would provide lines and services requested and needed by Plaintiff for the provision of Plaintiff's metro service, knowing Plaintiff intended to use them to provide that metro service. Furthermore, Defendant made material misrepresentations as to the "features" available on those services and the time and manner in which they would be provided.

25. The representations were false when made. Furthermore, at the time Defendant made the false representations to Plaintiff, Defendant knew that they were false, or Defendant made them recklessly, without knowledge of the truth, as positive assertion.

23. Defendant made these misrepresentations intending that Plaintiff would act thereupon.

24. In reliance thereon, Plaintiff sought investors, ordered the misrepresented services and products from Defendant, and commenced business operations, all at an extensive capital outlay. In addition to those expenses, Plaintiff has also incurred substantial attorneys' fees in protecting itself from Defendant's attempts to terminate service and other conduct, which was proximately caused by Defendant's misrepresentations, thereby causing Plaintiff added injury.

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COUNT V

INTERFERENCE WITH BUSINESS AND CONTRACTUAL RELATIONS

25. By the aforesaid conduct, Defendants have maliciously interfered with Plaintiff's contractual relations with Plaintiff's customers, causing damages to Plaintiff, for which Plaintiff hereby sues.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendants be cited according to law to appear and answer herein, and that after final trial Plaintiff have judgment against Defendants for those damages described above and in the full amount allowed by law, together with pre-judgment and post-judgment interest on such amount at the highest legal rate.

Plaintiffs further pray for additional damages pursuant to Section 15.21(a)(1) of the Texas Free Enterprise & Antitrust Act of 1983 for treble damages if the trier of fact finds that the above-described conduct was willful, flagrant, or intentional.

Plaintiff further prays for attorneys' fees that are reasonable and necessary in this cause and for costs of court.

Plaintiff further pray that punitive damages be assessed against Defendant.

Plaintiffs further pray for such other and further relief, at law or in equity, to which Plaintiffs may be justly entitled.

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Respectfully submitted.

THE LAW OFFICES OF RAY G. BESING, P.C.

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